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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TIMOTHY BOYKIN,
Petitioner,

v.

NORMAN MINETA.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY BOYKIN, *Pro Se*
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QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process of law when he was not afforded an administrative law judge in accordance with law?

2. Whether the Petitioner was denied due process of law when the Federal Aviation Administration willfully destroyed evidence in the case?

LIST OF PARTIES

The caption of the case contains the names of all the parties.

DECISIONS BELOW

The unpublished opinion of the Court of Appeals is reproduced in the appendix, pages 1a and 2a. The District Court's order is reproduced in the appendix, page 3a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 13, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. "

The pertinent text of 2 U.S.C. Section 1311, 5 U.S.C. Sections 554, 556, 3105, and 3344, 28 U.S.C. Section 1331, 29 U.S.C. Section 794a, 42 U.S.C. Section 1981a, 2000e-2(a), 2000e-3(a), 2000e-16(a), and 12117 are set out in the appendix, pages 4a through 8a.

STATEMENT OF THE CASE

Petitioner, Timothy Boykin, filed a complaint for damages in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging employment discrimination, based upon the Respondent's

misperception that he was handicapped by a substance abuse condition, in violation of his rights and protections under the fifth amendment of the United States Constitution, the Rehabilitation Act of 1973, and Title I of the Americans with Disabilities Act of 1990. As such, the Petitioner avails the rights and protections of Title VII of the Civil Rights Act of 1964, as amended.

Petitioner's instant complaint was based upon Respondent's adverse action to suspend him without pay for two weeks. Respondent stated that the suspension was justified because Petitioner improperly performed his duties as an air traffic control specialist and made a false statement during the subsequent investigation into the incident. Petitioner denied those allegations and purported that Respondent's articulated reason was pretext to discrimination. An administrative hearing was conducted by the EEOC that resulted in a finding of no discrimination.

Petitioner took civil action against Respondent in the United States District Court for the Eastern District of Virginia. Respondent filed a motion for summary judgment, which was granted, and the case was dismissed. The District Court, in memorandum opinion, stated, "[t]he evidence is clear that Plaintiff was suspended for the operational deviation that occurred . . . and attempted to cover up the initial problem." The Court also ruled that the Petitioner had not exhausted administrative remedies regarding his dual claim of retaliation by the Respondent for his resort to the EEO process.

Petitioner appealed to the U.S. Court of Appeals for the Fourth Circuit. The Circuit Court, in a per curiam decision, affirmed the judgment of the District Court, noting that Petitioner's retaliation claim did not require exhaustion,

but concluded that said claim was unsupported.

REASONS FOR GRANTING THE PETITION

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9,16 (1950). This Court has held that due process is a fundamental right to protect a persons life, liberty, and property. Because the due process issues relevant to Petitioner's case demonstrate a dispute amongst the lower Courts, and because the lower Courts have decided an important question of federal law that should be decided by this Court, and because a lower Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power, certiorari should be granted.

1. The administrative hearing held an administrative judge conducted concerning the Petitioner's discrimination complaint. That fact is in complete opposition to Congressional mandate per Title 5 Section 556, which requires said hearings to be conducted by an administrative law judge. Thereby, the Petitioner asserts that he was denied due process of law. Although the Petitioner does also assert that the lower Court erred in factual findings and misapplied law in his case, this petition concerns the larger importance of the impact of the lower Courts' rulings on the due process clause of this Court.

Title VII provides the "exclusive judicial remedy for claims of discrimination in federal employment." *Brown v. GSA*, 425 U.S. 835, (1976). Further, Congress created "an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination" in Title VII Section 717. However, the 10th Court of Appeals held that "[t]he Administrative Procedures Act has no application in federal employment discrimination cases because 42 U.S.C. Section 2000e-16(d) mandates that the provisions of 42 Section 2000e-5 (f-k) govern all civil actions brought thereunder." *Weahkee v. Powell*, 532 F.2d 729 (1976). Construction issues are matters of course reference the dynamic nature of the legislative branch. But, this Court not the lower Court should decide this important question of federal law.

2. Respondent knowingly and willfully destroyed evidence relevant to the Petitioner's discrimination claim. Thereby, the Petitioner asserts that he was denied due process of law. The lower Courts were of opinion that Petitioner did not support his discrimination claim. However, absent Respondent's spoliation of evidence, Petitioner would prove by said evidence that Respondent's allegations were false. Petitioner's asserts that technical air traffic control data indicated that he took action to avert a potential accident between two aircraft on a collision course. Petitioner further alleges that Respondent destroyed all evidence to conceal the fact that the certified rerecording of air traffic control communications was constructed fraudulently by the Respondent in order to falsely implicate the Petitioner. Again, these errors are not offered exclusively to benefit the Petitioner, but to consider the due process clause of this Court in light of the lower Court's ruling.

Spoliation doctrine is longstanding. "Where a writing

has been voluntarily destroyed for fraudulent purposes, . . . secondary evidence of its contents is not admissible." *Riggs v. Tayloe*, 22 (Wheat 9) 483 (1824). The lower Courts have held that a litigant reasonably anticipating litigation has an affirmative duty to preserve relevant evidence. Once identified, the Court has discretion to determine the severity of sanctions against the responsible party including adverse inference, dismissal, or default judgment. *Baliotis v. McNeil*, 870 F. Supp. 1285 (M.D.Pa. 1994). *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995); The lower Court's ruling validates Respondent's destruction of evidence and is in opposition to the rulings of other lower Courts. Further, the lower Courts have allowed the Respondent to admit secondary evidence, in conflict with decisions of this Court. Finally, inasmuch as the lower Courts' decision is based upon the Petitioner's lack of support for his claims and explicitly upon said secondary evidence, without any sanction against the Respondent for its intentional destruction of evidence, the lower Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power.

CONCLUSION

The Petitioner, Timothy Boykin, Pro Se, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2358

TIMOTHY BOYKIN,

Plaintiff - Appellant,

versus

NORMAN Y. MINETA, Secretary, Department of Transportation,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CA-03-477-A)

Submitted: March 24, 2004 Decided: April 13, 2004

Before WIDENER, WILKINSON, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Timothy Boykin, Appellant Pro Se. Richard Parker, Francis

Patrick King, Office of the United States Attorney, Dennis Carl Barghaan, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Timothy Boykin appeals the district court's order awarding summary judgment to Defendant in this employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm substantially on the reasoning of the district court.* See Boykin v. Mineta, No. CA-03-477-A (E.D. Va. filed Aug. 29, 2003 & entered Sept. 3, 2003). We grant the Government's motion to strike Boykin's attachments to his informal brief, and we deny Boykin's motion to supplement the record. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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*To the extent the district court dismissed Boykin's retaliation claim on the basis that it was not exhausted, we note that exhaustion is not required with regard to retaliation claims like the one at issue here. See Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992). However, because we conclude that Boykin fails to support his claim of retaliation, the district court's judgment need not be disturbed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TIMOTHY BOYKIN, Plaintiff, v. NORMAN MINETA, Secretary, Department of Transportation, Defendant.	)	Civil Action 03-477-A

ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment. For the reasons stated in the accompanying memorandum opinion, it is hereby,

ORDERED that Defendant's Motion for Summary Judgment is GRANTED, and this case is DISMISSED.

s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 29, 2003

Sec. 703(a) of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 2000e-2(a) read, in pertinent part:

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Sec. 704(a) of Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 2000e-3(a) read, in pertinent part:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

Sec. 717(a) of Title VII of the Civil Rights Act of

1964, as amended, and 42 U.S.C. § 2000e-16(a) read in pertinent part:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 [United States Code], in executive agencies [other than the General Accounting Office] as defined in section 105 of title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Rights and protections under title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and title I of the American with Disabilities Act of 1990 and 2 U.S.C. Section 1311 read, in pertinent part:

"(a) Discriminatory practices prohibited.

All personnel actions affecting covered employees shall be made free from any discrimination based on (1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C.

2000e-2); (2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or (3) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102 through 104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-12114).

(b) Remedy. (1) Civil rights. The remedy for a

violation of subsection (a)(1) of this section shall be -

(A) such remedy as would be appropriate if awarded under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)); and

(B) such compensatory damages as would be appropriate if awarded under section 1981 of title 42, or as would be appropriate if awarded under sections 1981a(a)(1), 1981a(b)(2), and, irrespective of the size of the employing office, 1981a(b)(3)(D) of title 42."

Remedies under the Rehabilitation Act and 29 U.S.C. Section 794a read, in pertinent part:

"(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy."

Procedures of the Rehabilitation Act of 1973 and 42 U.S.C. Section 12117 read, in pertinent part:

"(a) Powers, remedies, and procedures The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability

in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment."

Damages in disability discrimination cases and 42 U.S.C. Section 1981a read, in pertinent part:

"(a) Right of recovery (1) Civil rights In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent. (2) Disability In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as

allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent."

The Court's jurisdiction and 28 U.S.C. Section 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The Administrative Procedures Act and 5 U.S.C. Sections 554, 556, 3105, and 3344 read, in pertinent part:

"§554. Adjudications. (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved - (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision. (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section. (b) There shall preside at the taking of evidence - (1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title.

§3105. Appointment of administrative law judges. Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as

administrative law judges.

§3344. Details; administrative law judges. An agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law judges selected by the Office of Personnel Management from and with the consent of other agencies.

(2)

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TIMOTHY BOYKIN,
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v.

NORMAN MINETA.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The
Fourth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TIMOTHY BOYKIN,	)	
Plaintiff,	)	
v.	)	Civil Action 03-477-A
NORMAN MINETA, Secretary, Department of Transportation,	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Defendant's Motion for Summary Judgment. Plaintiff brings this action for unlawful disability discrimination under the Rehabilitation Act, 42 U.S.C. Section 200e et seq. (1994 & Supp. 2003).

Plaintiff began his employment with the Federal Aviation Administration ("FAA") on December 13, 1981, as an air traffic control specialist. On April 26, 1987, Plaintiff began working as an air traffic control specialist at the Washington Air Route Traffic Control Center ("Washington Center") in Leesburg, Virginia.

On March 24, 1988, Plaintiff was arrested and charged with reckless driving, driving under the influence, and possession of drug paraphernalia. Plaintiff subsequently pled

guilty and was convicted of driving under the influence. As a result of this charge, Plaintiff was referred to the Employee Assistance Program ("EAP") for substance abuse counseling on April 3, 1988, and was required to submit to a drug test pursuant to the Department of Transportation's "reasonable suspicion" policy on April 6, 1988. Joyce Sexton, the Washington Center's Air Traffic Manager at the time, proposed Plaintiff's termination from employment on June 2, 1988, and later rescinded this proposal on October 3, 1988.

Plaintiff contacted an EEO counselor on February 9, 1989, and alleged that he had been removed from air traffic control duties for a period of time following his arrest. Plaintiff did not mention his referral to EAP, the mandatory drug test, or the proposed termination notice at this time. Plaintiff's final counseling interview was on April 15, 1989, and Plaintiff filed a formal complaint against the FAA on April 17, 1989, alleging that he was discriminated against in being removed from air traffic control duties. The FAA rejected Plaintiff's administrative complaint because he had previously initiated a union grievance. On October 13, 1989, the EEOC's Office of Federal Operations ("OFO') affirmed the FAA's decision to reject the complaint, and on May 4, 1990, the OFO dismissed Plaintiff's request to reconsider. Plaintiff did not file a civil complaint in federal court within ninety days of May 4, 1990.

In November 1992, Sabra Kaulia became the Air Traffic Manager at the Washington Center. At this time, Ricardo Short was Plaintiff's first-line supervisor. On March 3, 1993, Plaintiff was responsible for controlling an air space geographically near the Raleigh-Durham Airport in North Carolina. Specifically, Plaintiff was responsible for aircraft flying at an altitude of greater than 11,000 feet. Plaintiff accepted control of three military aircraft bearing the codes RAVEN22, PETRO23, and PETRO24, that had just taken off from a North Carolina air base. RAVEN22 was the lead aircraft of the planes, which were

flying in formation, and served as the main communicator with Plaintiff. After Plaintiff took control of these aircraft, they penetrated the airspace controlled by Raleigh Approach at levels under 9,400 feet. Plaintiff did not inform Raleigh Approach that the aircraft were now traveling through its airspace.

In the next few minutes, Plaintiff repeatedly asked RAVEN22 to state the altitude of its lower-flying aircraft. Each time, RAVEN22 stated that the aircraft were flying below 10,000 feet. Another controller then asked Plaintiff to switch control of RAVEN22 to him. Plaintiff again asked RAVEN22 for its altitude, and RAVEN22 responded with an altitude of 9,500 feet. Plaintiff next requested that RAVEN22 direct its lowest-flying aircraft to climb through 11,000 feet. When RAVFEN22 flew through 11,000 feet, Plaintiff switched control of RAVEN22 to another controller. During this incident, RAVEN22 had traversed Raleigh Approach's airspace for over sixteen miles and Plaintiff never informed Raleigh Approach of RAVEN22's existence.

As a result of Plaintiff's delay transferring control of RAVEN22, an operational error, occurred between RAVEN22 and another aircraft in the area at that time. When RAVEN22 entered Raleigh Approach's airspace without knowledge, an operational deviation occurred. Under FAA procedures, a review board investigated the operational deviation. During the investigation, Plaintiff initially informed the review board that an operational deviation had not occurred. When confronted with the physical evidence, Plaintiff then acknowledged that the deviation had occurred.

Based on this evidence, Short determined that Plaintiff knew that the operational deviation was occurring at the time and did nothing to protect the aircraft. Short believed that Plaintiff attempted to prevent others from learning that the deviation had occurred. Short concluded that Plaintiff's initial statement to the review board that he did not have an operational

deviation was false. Short believed some form of discipline was appropriate, and as required by procedure Kaulia was required to approve any disciplinary actions recommended by Short, as well as all operational errors and deviations. Kaulia initially believed Plaintiff should be terminated for his actions, but after discussing the proposal with FAA's Eastern Regional Office and based upon Short's recommendation from April 9, 1993, and Plaintiff's subsequent May 4, 1993 reply, Ms. approved a ten-day suspension. Plaintiff was informed on July 7, 1993, that he would be given a ten-day suspension effective July 20, 1993 through July 31, 1993.

Plaintiff sought EEO counseling on April 5, 1993. On August 3, 1993, Plaintiff filed an administrative complaint against the FAA alleging that various actions dating back to 1988 were motivated by the erroneous belief that he was a substance abuser. The FAA denied the majority of Plaintiff's complaint as untimely, but accepted Plaintiff's allegation that his suspension was based on disability discrimination. Plaintiff appealed the denial of the remaining allegations, and the OFO affirmed the agency's denial of those allegations not arising from the March 1993 incident. Plaintiff received a full hearing on the ten-day suspension before an EEOC administrative judge on May 4, 1998. In an August 24, 1998 opinion, the administrative judge found no discrimination by Short or Kaulia. The FAA adopted this decision on August 31, 1998, and the OFO affirmed on February 21, 2002. Plaintiff subsequently brought this action.

Rule 56 (c) of the Federal Rules of Civil Procedure states that: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). The plain language of Rule 56(c) mandates

the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 332 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment must be granted. See id. at 249-50.

To establish a prima facie case for disability discrimination, Plaintiff must prove that: (1) he has a disability; (2) that he is a qualified individual for the employment in question; and (3) that his employer took adverse employment action against him because of his disability. EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 377 (4th Cir. 2000). An adverse employment action "includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment." Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001) (internal citation omitted).

Plaintiff first alleges disability discrimination based upon his referral to EAP, his mandatory drug testing, and his proposed and later rescinded termination in 1988. Prior to bringing a civil complaint, federal employees must first exhaust their administrative remedies. Brown v. GSA, 425 U.S. 820, 832-33 (1976). At the time of these events, an aggrieved employee was required to contact an EEO counselor within thirty days of the alleged discriminatory event. See 29 C.F.R. Section 1613.214(a)(1)(i) (1988). If the counseling session is unsuccessful, and employee was required to file a formal complaint with the agency within fifteen days of receiving notice to do so. Id. Section 1613.214(a)(1)(ii). Plaintiff was referred to EAP on April 3, 1988; he took a drug test on April 6,

1988; and Ms. Sexton proposed his termination on June 2, 1988, and rescinded her proposal on October 3, 1988. Plaintiff, however, did not seek EEO counseling until February 9, 1989, and then did not include these actions in his complaint, which was later dismissed. Plaintiff did not file a civil complaint within thirty days of the OFO's final denial on May 4, 1990, and thus these claims are barred.

Plaintiff next alleges that in September 1990, the FAA Area Manager told Plaintiff's first level supervisors to routinely give specific and direct instructions on how to perform his air traffic control duties and to discipline Plaintiff for failure to comply with these orders. There is no evidence that Plaintiff sought EEO counseling with respect to this allegation. Plaintiff never filed an administrative complaint with the FAA alleging that this directive constituted unlawful discrimination. Plaintiff also states that on December 21, 1992, two members of FAA's supervisory staff falsely accused him of violating FAA procedures. Plaintiff sought informal counseling on January 13, 1993, but did not visit an EEO counselor or file an administrative complaint within fifteen days of counseling. 29 C.F.R. Section 1613.214(a)(1)(ii) (1992)). Because Plaintiff did not exhaust his administrative remedies, Defendant is entitled to summary judgment on these allegations.

Plaintiff finally alleges that his ten-day suspension was the result of FAA management's perception that he was a substance abuser and claims both disability discrimination and retaliation. If a defendant provides a legitimate, non-discriminatory reason for an adverse employment action, the burden shifts to the plaintiff to demonstrate that the reason is mere pretest for discrimination. Reeves v. Sanderson Plumbing Prod., 520 U.S. 133, 142-43 (2000). The evidence is clear that Plaintiff was suspended for the operational deviation that occurred on March 3, 1993, and instead of taking immediate action to address the safety situation, Plaintiff attempted to

cover up the initial problem. Plaintiff also complains that his ten-day suspension was based on retaliation for his resort to the EEO process in January 1993. However, Plaintiff did not file his administrative complaint concerning the suspension until August 1993, and then did not allege retaliation for protected activity until 1998 during the administrative hearing. Because Plaintiff did not exhaust his administrative remedies regarding retaliation, and because Plaintiff was suspended for a legitimate, non-discriminatory reason, Defendant is entitled to summary judgment on these claims.

For the reasons stated above, Defendant's Motion for Summary Judgment should be granted.

An appropriate order shall issue.

s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 29, 2003